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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ROBERT PARKER,

Plaintiff and Appellant,

v.

MARK KALISH,

Defendant and Respondent.

D052391

(Super. Ct. No. 37-2007-00067254-
CU-PO-CTL)

APPEAL from an order and judgment of the Superior Court of San Diego County,
Luis R. Vargas, Judge. Affirmed.

Plaintiff Robert Parker (Parker) appeals from the trial court's order (the order) granting defendant Mark Kalish, M.D.'s special motion to strike Parker's complaint under Code of Civil Procedure¹ section 425.16, commonly referred to as the anti-SLAPP statute, which authorizes the early dismissal of certain lawsuits that qualify as a "strategic lawsuit against public participation" (SLAPP). (*Equilon Enterprises v. Consumer Cause*,

¹ All further statutory references are to the Code of Civil Procedure unless otherwise specified.

Inc. (2002) 29 Cal.4th 53, 57 (*Equilon*); *Navellier v. Sletten* (2002) 29 Cal.4th 82, 85 (*Navellier*).) Kalish's motion challenged the propriety of Parker's action for damages he allegedly suffered as a result of a court-ordered defense psychiatric examination that Kalish performed in connection with Parker's underlying lawsuit against his neighbors. We affirm the order and judgment in favor of Kalish because (1) Kalish's conduct as alleged in Parker's complaint was merely incidental to Kalish's protected activity under the court order authorizing him to perform the psychiatric examination, and thus Kalish met his burden of showing Parker's lawsuit against him substantially arose from protected activity for purposes of the anti-SLAPP statute; and (2) Parker failed to show a probability of prevailing on the merits of any of his five causes of action.

FACTUAL AND PROCEDURAL BACKGROUND

A. Parker's Underlying Lawsuit and the Court-Ordered Psychiatric Examination

In May 2004 Parker and his wife (together the Parkers) filed a lawsuit (the underlying action)² against four neighbors who were tenants in an alleged "de facto fraternity house" owned by Lauren Hunter, whom they also named as a defendant. In their complaint, the Parkers asserted causes of action for nuisance and intentional and negligent infliction of emotional distress, alleging that loud, offensive, and retaliatory behavior of the defendant tenants injured the Parkers' health and caused them to suffer emotional distress. Parker also alleged that as a result of the defendant tenants' conduct, he lost income and was required to take a medical leave from work.

² *Parker v. Behrouzi* (Super. Ct. San Diego County, 2004, No. 829696).

The Parkers settled their claims in the underlying action with all but two of the defendants, Hunter and Behzad Behrouzi. In May 2005 Parker rejected a section 998 settlement offer from Hunter in the amount of \$21,101.

Later that month, the court granted Hunter's motion under section 2032, subdivision (d), for an order compelling Parker to submit to a psychiatric examination. On May 24 of that same year, Parker submitted to the court-ordered psychiatric examination, which Kalish performed.

After the psychiatric examination, Hunter served Parker with a second section 998 settlement offer, in the amount of \$10,701, which Parker accepted after he unsuccessfully attempted to accept Hunter's first section 998 offer. Judgment was entered in favor of Parker pursuant to the terms of the second section 998 offer. This court affirmed the judgment after Parker unsuccessfully appealed that judgment (in *Parker v. Hunter* (Jul. 27, 2006, D047293) [nonpub. opn]), claiming he had validly accepted Hunter's first section 998 offer.

B. Parker's Complaint in this Action

In May 2007 Parker filed in propria persona a complaint against Kalish in the instant case, seeking compensatory damages in a sum exceeding \$100,000 plus punitive damages, and alleging five causes of action: (1) fraud, (2) intentional infliction of emotional distress, (3) medical malpractice, (4) breach of implied contract, and (5) tortious violation of medical privacy. All of these claims were based on Kalish's alleged conduct during, or in connection with, the court-ordered psychiatric examination of Parker that Kalish performed in May 2005 in the underlying action, as follows:

1. *Fraud*

In his first cause of action for fraud, Parker alleged that he "appeared voluntarily" at Kalish's office, and Kalish (1) through Hunter's attorney, Alan Brubaker, falsely "communicated to . . . Parker that [Kalish] would perform a review of the records of the [underlying action], including review of all deposition transcripts"; (2) falsely communicated to Parker, through Brubaker, that "the examination would not be painful or improper"; and (3) falsely represented to Parker during the psychiatric examination that he (Kalish) had been hired by Behrouzi. Parker also alleged that he justifiably relied on Kalish's claim and was "enticed by the claims to attend the mental examination conducted by . . . Kalish."

2. *Intentional infliction of emotional distress*

In his second cause of action for intentional infliction of emotional distress, Parker alleged that Kalish "engag[ed] in offensive conduct during the mental examination, including, but not limited to: [¶] a. Failing to treat Parker with dignity and respect, [¶] b. Failing to allow Parker to answer questions without interruption, [¶] c. Laughing at Parker during the question and answer session, [¶] [and] d. Attempting to cajole Parker to stay past the 4-hour time limit agreed to before the examination." He also alleged that Kalish "breached his duty to Parker by engaging in offensive conduct immediately after the mental examination, by making an illegal and false communication regarding the examination to attorney Brubaker."

3. Medical malpractice

In his third cause of action for medical malpractice, Parker alleged that as a proximate result of Kalish's "breach of the standard of care" during the May 2005 psychiatric examination, Parker "received poor performance appraisals from his employer for the calendar years 2004, 2005, and 2006, resulting in salary compensation and stock option compensation that would otherwise have been higher"

4. Breach of implied contract

In his fourth cause of action for breach of implied contract, Parker alleged that an implied contract was formed by Kalish's false claims as alleged in the fraud cause of action, and by Parker's "voluntary submission" to the psychiatric examination performed by Kalish. Parker also alleged that Kalish "breached the contract by failing to properly review all deposition transcripts in the [underlying action], and by failing to do a thorough and proper mental examination, and by failing to do a thorough and proper evaluation of Parker and the case, and by failing to issue a competent report."

5. Tortious violation of medical privacy

Last, in his fifth cause of action for tortious violation of medical privacy, Parker alleged that after the psychiatric examination, Kalish "illegally and falsely stated details of the mental examination to attorney . . . Brubaker," and that "Kalish's revelation of details of the mental examination was an illegal violation of the privacy of Parker's medical records."

C. Kalish's Anti-SLAPP Motion To Strike

Kalish filed a special motion to strike Parker's complaint under the anti-SLAPP statute (§ 425.16). Kalish brought the motion on two grounds: (1) Parker's complaint arose out of an act that was "in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue" within the meaning of section 425.16, subdivision (b)(1); and (2) Parker was unable to meet his burden of showing a probability of prevailing on his claims because the litigation privilege (Civ. Code, § 47, subd. (b)) is an absolute defense in this case. Brubaker submitted his own declaration in support of Kalish's motion, stating that attorney Greg Konoske, who represented one of the other defendants in that action, had initially contacted Kalish about retaining him as a defense expert witness with respect to Parker's emotional distress claims. Brubaker also stated that when Konoske's client settled out of underlying action, Brubaker's office started communicating with Kalish and ultimately retained him as an expert. He also stated that his office began conferring with Parker about a mental examination of Parker and, when Parker refused to voluntarily submit to such an examination, Brubaker's firm filed the motion to compel the mental examination. Attached as an exhibit to Kalish's motion to strike was a copy of the court order in the underlying action compelling Parker to undergo the psychiatric evaluation performed by Kalish.

In opposition to the anti-SLAPP motion to strike, Parker submitted his declaration and a four-page memorandum. In his declaration, he indicated that on the day of the psychiatric examination, he decided he would complete the four-hour examination if he

felt Kalish was "getting a good impression" of him, but if the examination was "going poorly," he would leave and immediately accept Hunter's \$21,101 section 998 offer. According to Parker, Kalish opened the examination by referring to Parker as "Mr. Yogurs," and during the examination made the statements alleged in Parker's complaint (discussed, *ante*).

1. *Ruling*

The court issued a tentative ruling granting Kalish's motion to strike Parker's complaint under the anti-SLAPP statute. The court found the allegations in Parker's complaint all arose out of statements Kalish made during, or in relation to, the psychiatric examination undertaken for the purposes of litigation in the underlying action, and thus the statements "constitute[d] protected activity" and fell within the anti-SLAPP statute. The court also found that Parker had failed to show a probability of prevailing on the merits because "[t]he basis for [Parker's] complaint [was] statements made by Kalish during a court[-]ordered mental examination," and thus Kalish's alleged statements were protected by the litigation privilege set forth in Civil Code section 47, subdivision (b) (hereafter Civil Code section 47(b)).

During oral argument, Parker argued that when the psychiatric examination began, Kalish called him "Mr. Yoterst," which "set [Parker] on [his] heels initially" because (he asserted) Mr. Yoterst was a convicted rapist that Kalish examined around the same time he examined Parker. Parker asserted that he stayed and went through the "abusive" examination because Kalish fraudulently told him he was conducting the examination on

behalf of Behrouzi, who was one of the defendants in the underlying action, and Kalish thereby "completely changed [Parker's] course of action."

Kalish's counsel responded that a copy of the court order compelling Parker to participate in the psychiatric examination and showing that Parker was present when the court made that order was attached to Kalish's moving papers and demonstrated that Parker's fraud claim lacked merit. The purpose of the psychiatric examination and report, he argued, was "to achieve the overall objective of the litigation" in the underlying action, which was the evaluation of Parker's "psychiatric mentation," and thus the evaluation was "covered by the litigation privilege."

The court confirmed its tentative ruling and issued an order striking Parker's complaint and awarding Kalish reasonable statutory attorney fees in the amount of \$4,000. The court thereafter entered a judgment in favor of Kalish that was consistent with the order. Parker's appeal followed.

APPLICABLE LEGAL PRINCIPLES AND STANDARD OF REVIEW

In *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1414, this court explained that section 425.16 was enacted to deter and prevent SLAPP suits in order to protect citizens in the exercise of their First Amendment constitutional rights of free speech and petition. We also explained that a SLAPP suit is generally defined as a meritless suit filed primarily to chill the defendant's exercise of First Amendment rights.

"Section 425.16[, subdivision](b)(1), authorizes a special motion to strike a SLAPP suit and expressly makes subject to such a motion "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition

or free speech under the United States or California Constitution in connection with a public issue . . . , unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."" (*Bernardo v. Planned Parenthood of America* (2004) 115 Cal.App.4th 322, 340-341, italics omitted.)

In *Navellier, supra*, 29 Cal.4th at page 88, our Supreme Court explained the two-step process that a court must follow in determining whether an action is a SLAPP within the meaning of section 425.16: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); see generally *Equilon, supra*, 29 Cal.4th at p. 67.)"

Subdivision (e) of section 425.16 provides that the phrase "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue," as used in section 425.16, includes four categories of conduct that are separately defined subdivision (e), as follows:

"(1) [A]ny written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;

"(2) [A]ny written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

"(3) [A]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; [or]

"(4) [A]ny other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Italics added.)

"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier, supra*, 29 Cal.4th at p. 89.)

The California Supreme Court has recognized that the anti-SLAPP statute should be broadly construed. (*Equilon, supra*, 29 Cal.4th at p. 60, fn. 3.) "In deciding whether the initial 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Navellier, supra*, 29 Cal.4th at p. 89, citing § 425.16, subd. (b).) "[T]he principal thrust or gravamen of the plaintiff's cause of action determines whether the anti-SLAPP statute applies." (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188.)

Where substantial parts of the factual basis for the complaint are statements or conduct protected under section 425.16, subdivision (e), the anti-SLAPP statute will apply. (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 104 (*Mann*).) Likewise, if arguably unprotected statements or conduct are alleged, but they are only incidental or collateral to a cause of action based essentially on protected activity, the

anti-SLAPP statutory scheme may still provide protection. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton* (2005) 133 Cal.App.4th 658, 672-673; *Mann, supra*, 120 Cal.App.4th at p. 103; see also *Martinez v. Metabolife Internat., Inc., supra*, 113 Cal.App.4th at pp. 186-188.)

In order to meet his burden of establishing the requisite probability of prevailing (§ 425.16, subd. (b), "the plaintiff need only have "stated and substantiated a legally sufficient claim;" that is, the plaintiff must show "that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Navellier, supra*, 29 Cal.4th at pp. 88-89.) However, a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a "garden variety breach of contract [or] fraud claim" when in fact the plaintiff's claim is based on protected speech or conduct. (*Id.* at pp. 90-92.) "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Id.* at p. 92, italics omitted.)

We review an order granting or denying a motion to strike under section 425.16 independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.)

DISCUSSION

For reasons we shall discuss, we conclude the court did not err in granting Kalish's motion under section 425.16 to strike Parker's complaint, as the record on appeal shows

that (1) Kalish met his burden of showing Parker's lawsuit substantially arose from protected activity for purposes of the anti-SLAPP statute, and (2) Parker failed to meet his burden of demonstrating a probability of prevailing on any of the five causes of action alleged in his complaint.

A. Parker's Claims Substantially Arose from Kalish's Protected Activity

To meet his initial burden of showing that Parker's complaint arose from protected activity, Kalish is required to demonstrate that the alleged acts underlying Parker's claims against him fit one of the categories set forth in section 425.16, subdivision (e) (discussed, *ante*). (See § 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) As already discussed, subdivision (e) of section 425.16 protects "any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body."

Here, it is undisputed that the psychiatric examination of Parker that Kalish performed was ordered by the court in the underlying action. If Kalish's alleged statements and conduct are substantial parts of the factual basis underlying Parker's complaint and any arguably unprotected alleged statements or conduct by Kalish are only incidental or collateral to Parker's claims, Kalish's alleged statements and conduct were "made in connection with an issue under consideration or review by a . . . judicial body" within the meaning of section 425.16, subdivision (e), and thus arose from protected activity for purposes of the anti-SLAPP statute. (See *Mann, supra*, 120 Cal.App.4th at p. 104; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton, supra*, 133 Cal.App.4th at pp. 672-673.)

An examination of the factual allegations in Parker's complaint and the statements in his declaration in opposition to Kalish's section 425.16 motion to strike reveal that all five counts in Parker's complaint are based on Kalish's alleged conduct during, or related to, the court-ordered psychiatric examination that Kalish performed. Specifically, Parker's complaint shows that his *fraud* cause of action is based on statements Kalish allegedly made regarding (1) the records he would review, (2) whether the examination would be painful, and (3) who had hired him. Parker's cause of action for *intentional infliction of emotional distress* is based on vague allegations that Kalish failed to treat Parker during the examination with "dignity and respect," that he failed to allow Parker to "answer questions without interruption," that he laughed at Parker during the question and answer session, that he "attempted to cajole" Parker to stay past the four-hour time limit ordered by the court, and that he made "an illegal and false communication regarding the examination to attorney Brubaker." Parker's *medical malpractice* cause of action is based on a general allegation that Kalish "breached the standard of care which others in the profession would employ in the same or similar circumstances." His cause of action for *breach of implied contract* is based on allegations that Kalish failed to properly review all of the deposition transcripts in the underlying action, failed to do a "thorough and proper mental examination," failed to do a "thorough and proper evaluation of Parker and the case," and failed to "issue a competent report." Parker's last cause of action for *tortious violation of medical privacy* is based on allegations that Kalish "illegally and falsely stated details of the mental examination" to Hunter's attorney, Brubaker, who had brought the motion to compel the psychiatric evaluation.

In his opposition declaration, Parker indicates that immediately before he entered Kalish's office to undergo the psychiatric examination, he decided he would complete the four-hour examination if he felt Kalish was "getting a good impression" of him, but would leave and immediately accept Hunter's \$21,101 section 998 offer if the examination was "going poorly." Parker also states that Kalish opened the examination by referring to him as "Mr. Yogurs," and during the examination Kalish made the statements alleged in Parker's complaint (discussed, *ante*).

The foregoing review of Parker's pleading and declaration demonstrates that, although some of Parker's allegations pertained to arguably unprotected activity, the gravamen of Parker's complaint is that Kalish should be held liable for statements he made "in connection with an issue under consideration or review by a . . . judicial body" within the meaning of subdivision (e) of section 425.16, that "issue" being Parker's claim in the underlying action that the remaining, nonsettling defendants in that case—Hunter and Behrouzi—caused him to suffer severe emotional distress. Accordingly, we conclude on de novo review that Kalish has met his burden of showing Parker's complaint substantially arose from protected activity for purposes of the anti-SLAPP statute.

B. Parker Has Failed To Show a Probability of Prevailing on His Claims

Because Kalish has met his statutory burden under the anti-SLAPP statute, the burden shifts to Parker to establish a probability of prevailing on one or more of the five counts alleged in his complaint. (See § 425.16, subd. (b)(1); *Navellier, supra*, 29 Cal.4th at p. 88.) We conclude that Parker has failed to meet that burden because he has not shown, and cannot establish, that his complaint is both legally sufficient and supported by

a sufficient prima facie showing of facts to sustain a judgment in his favor if his evidence were credited.

1. *Applicable legal principles*

With exceptions not applicable here, Civil Code section 47(b) provides in part: "A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . judicial proceeding." The litigation privilege affords litigants and witnesses "the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213) and applies to "any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Id.* at p. 212.)

In *Flatley v. Mauro*, *supra*, 39 Cal.4th at page 323, our Supreme Court explained that although Code of Civil Procedure section 425.16 and Civil Code section 47(b) are not substantively the same, "[t]he litigation privilege is . . . relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." The high court has also recognized that, "[j]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47[(b)] [citation], . . . such statements are equally entitled to the benefits of section 425.16." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, quoting *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784.)

2. Analysis

In his section 425.16 motion to strike Parker's complaint and on appeal, Kalish argues that Parker cannot prevail in this case because Kalish's alleged activities are "absolutely privileged under Civil Code Section 47(b)." (Italics omitted.) Parker claims that for purposes of the litigation privilege a distinction must be made in this case between testimonial conduct and nontestimonial conduct and contends the litigation privilege does not apply because his injuries are predicated not upon the publication of an injurious falsehood, "but rather upon the negligent performance of the examination wholly apart from any publication."

We need not decide the issue of the scope of the litigation privilege in this case because Parker has not met, and cannot meet, his burden of establishing a probability of prevailing on his claims as he has not shown, and cannot show, that his complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence he has submitted were credited. (See *Navellier, supra*, 29 Cal.4th at pp. 88-89.) His first cause of action for fraud is legally insufficient. Justifiable reliance on a defendant's allegedly false representations is an essential element of a fraud cause of action. (*Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 990.) Here, Parker alleges in his complaint that he "appeared voluntarily" at Kalish's office, and he justifiably relied on Kalish's allegedly false "claims" in that he (Parker) was "enticed by the claims to attend the mental examination" that Kalish conducted. Parker's factual premise that he "voluntarily" appeared for the psychiatric

examination is refuted by the undisputed fact that his attendance was compelled by a lawful court order.

Parker's second cause of action for intentional infliction of emotional distress is also legally insufficient. To prevail on this claim, Parker must prove three elements: ""(1) *extreme and outrageous conduct* by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; and (3) actual and proximate causation of the emotional distress by the defendant's outrageous conduct."" (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) Here, as already discussed, Parker's intentional infliction of emotional distress claim is based on his allegations that Kalish failed to treat him with "dignity and respect," failed to allow him to "answer questions without interruption," laughed at him, attempted to "cajole" him to stay past the 4-hour time limit, and made an "illegal and false communication" regarding the examination to Hunter's attorney. We conclude that none of Parker's supporting allegations is legally sufficient to show that Kalish engaged in extreme and outrageous conduct, as liability based upon an intentional infliction claim "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1122, overruled on another ground in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854, fn. 19.)

Parker has also failed to show a probability of prevailing on his third cause of action for medical practice. Where, as here, a physician examines an individual for purposes other than medical treatment, no physician-patient relationship is created.

(*Keene v. Wiggins* (1977) 69 Cal.App.3d 308, 313.) Furthermore, where (as here) the conduct required of a medical professional is not within the common knowledge of laymen, a plaintiff must present expert witness testimony to prove a breach of the standard of care; and the plaintiff also must show that the defendant's breach of the standard of care was the cause, within a reasonable medical probability, of his injury. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 509.) Here, the record is devoid of any expert witness testimony showing that Kalish's conduct fell below the standard of care, or was a legal cause of any alleged injury.

Parker's fourth cause of action for breach of implied contract is legally insufficient. The essential elements of contract formation are parties capable of contracting, their mutual consent, a lawful object, and consideration. (Civ. Code, §§ 1550, 1565.) Here, Parker's assertion that an implied contract was formed by (among other things) his "voluntary submission to the mental examination," is belied by the undisputed fact (discussed, *ante*) that his attendance was not voluntary pursuant to some agreement, but was compelled by court order. Furthermore, because his attendance was judicially compelled, he cannot show the alleged implied contract was supported by mutual consent or consideration.

Last, Parker's fifth cause of action for tortious violation of medical privacy is legally insufficient. As already discussed, this claim is based on Parker's allegations that (1) after the psychiatric examination, Kalish "illegally and falsely stated details of the mental examination to attorney . . . Brubaker"; and thus (2) "Kalish's revelation of details of the mental examination was an illegal violation of the privacy of Parker's medical

records." The court in the underlying action issued the lawful order compelling Parker to submit to the psychiatric examination after granting Hunter's motion to compel the examination. Parker has cited no authority showing that Kalish's "revelation of details of the mental examination" to Hunter's attorney, Brubaker, was a tortious violation of Parker's right to privacy.

In sum, the record shows that Parker's action against Kalish is a meritless SLAPP, and the court did not err in granting Kalish's motion to strike Parker's complaint under section 425.16.

DISPOSITION

The order and judgment are affirmed, and Kalish shall recover his costs on appeal.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.